

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA

4 v. 10C553 (SHS)

5 MONDHER BEJAOUI,

Decision

6 Defendant.

7 -----x

8 New York, N.Y.  
9 October 3, 2012  
2:35 p.m.

10 Before:

11 HON. SIDNEY H. STEIN

District Judge

12  
13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the  
Southern District of New York

16 RACHEL P. KOVNER

ALEXANDER WILSON

17 Assistant United States Attorneys

18 JOSHUA L. DRATEL

19 LINDSAY LEWIS

20 Attorneys for Defendant

1 (Case called)

2 THE CLERK: Counsel, please state your names for the  
3 record.

4 MS. KOVNER: Good afternoon, your Honor. Rachel  
5 Kovner and Alexander Wilson for the government.

6 MR. DRATEL: Good afternoon, your Honor. Joshua  
7 Dratel and Lindsay Lewis for the defendant.

8 THE COURT: Good afternoon. The defendant is present.  
9 Please be seated in the courtroom.

10 I have called you in for a decision on the pending  
11 motion to determine the mental competency of the defendant to  
12 stand trial. We had a two-day fact hearing on this, and I have  
13 thought long and hard about it and analyzed all the information  
14 that I have on the hearing, including the reports and  
15 transcript.

16 I have come to the conclusion that Mr. Bejaoui is  
17 competent to stand trial, he can understand the nature and  
18 consequences of the proceeding against him, and has the ability  
19 to assist properly in his defense. I am going to read a  
20 decision into the record so you will have that in full measure.  
21 My decision is as follows.

22 On January 24, 2011, Bejaoui's counsel requested that  
23 the Court appoint a psychologist or psychiatrist to evaluate  
24 his mental competence to stand trial on the grounds that there  
25 was reasonable cause to believe, in defense counsel's opinion,

1 that the defendant was suffering from a mental disease or  
2 defect that rendered him mentally incompetent to the extent  
3 that he was unable to understand the nature and consequences of  
4 the proceedings against him or to assist properly in his  
5 defense pursuant to 18 U.S.C. 4241(a).

6 Richard Krueger, MD, evaluated the defendant's  
7 competence for the defense. Sean J. Hannell, a Ph.D, evaluated  
8 his competence for the government on the basis of those  
9 experts' opinions. I concluded on October 7, 2011, that the  
10 defendant suffered from such a mental disease or defect, and I  
11 committed him to the custody of the Bureau of Prisons for that  
12 entity to assess whether the defendant was likely to be  
13 restored to competence, which is the procedure under 18 U.S.C.

14 The Bureau of Prisons transferred Mr. Bejaoui from  
15 federal medical center at Devens to federal medical center in  
16 Butner, North Carolina, for purposes of determining whether he  
17 was likely to be restored to competency. In March the board  
18 certified forensic psychologist Robert E. Cochrane, director of  
19 psychology training at Butner, and board certified forensic  
20 psychiatrist Byron Herbel concluded that the defendant was in  
21 fact competent and had been malingering, that is, intentionally  
22 displaying or exaggerating symptoms of mental illness.

23 Following the Butner report, the defense had the  
24 defendant examined by his own expert, board certified  
25 psychiatrist Michael First, professor of clinical Columbia

1 College of Physicians and Surgeons. Dr. First concluded that  
2 the professionals at Butner had misjudged Bejaoui's condition  
3 and that Bejaoui did in fact lack the competence to stand  
4 trial. He concluded that the defendant had major depression  
5 with psychotic features and that this impaired his ability to  
6 be competent. That is, he concluded he was not competent to  
7 stand trial.

8 On August 13 and 14 of this year, the Court held a  
9 fact hearing pursuant to 18 U.S.C. 4247(d) at which Dr.  
10 Cochrane testified for the prosecution and Dr. First testified  
11 for the defense. Each doctor was cross-examined extensively by  
12 the opposing party's attorney.

13 I received in evidence each expert report and all  
14 prior psychological and psychiatric evaluations of the  
15 defendant as well as transcripts and recordings of phonecalls  
16 that Mr. Bejaoui made while incarcerated. You will see that  
17 those phonecalls do play a not insignificant role in my  
18 thinking on this matter.

19 The standard for my determination is rather  
20 straightforward: That whether or not a defendant is competent  
21 to stand trial is a matter of constitutional importance. See  
22 Cooper v. Oklahoma, 517 U.S. 348, 354 (1996).

23 "A defendant may not be put to trial unless he has  
24 sufficient present ability to consult with his lawyer with a  
25 reasonable degree of rational understanding and a rational as

1 well as factual understanding of the proceedings against him."

2 That is from Cooper at 354.

3           Nonetheless, "It is well established that some degree  
4 of mental illness cannot be equated with incompetence to stand  
5 trial." United States v. Vamos, 797 F.2d 1146-1150 (2d Cir.  
6 1998).

7           Before declaring the defendant incompetent to stand  
8 trial, the test is that I must find "by a preponderance of the  
9 evidence that the defendant is presently suffering from a  
10 mental disease or defect rendering him mentally incompetent to  
11 the extent that he is unable to understand the nature and  
12 consequences of the proceedings against him or to assist  
13 properly in his defense." That is section 4241(d). See also  
14 United States v. Nichols, 56 F.3d 403 (2d Cir. 1995). I have  
15 already told the parties that the preponderance of the evidence  
16 does not support the conclusion that Mr. Bejaoui is incompetent  
17 to stand trial.

18           Both the government expert Cochrane and the defense  
19 expert First diagnosed Bejaoui with mental disorders, Cochrane  
20 implying that he had adjustment disorder with depressed and  
21 anxious mood as well as histrionic personality features.

22 That's the Cochrane report Government Exhibit 122.

23           Dr. First agreed to a certain extent insofar as he  
24 opined that the defendant suffered from major depressive  
25 disorder with psychotic features and undifferentiated

1 somatoform disorder as well as personality disorder NOS with  
2 histrionic and schizotypal features. Those are quotes from the  
3 First report, which is Government Exhibit 4 at page 15.

4 My task is not to determine whether or not the  
5 defendant is a picture of mental health. It is to determine  
6 whether he is presently suffering from a mental disease or  
7 defect that renders him incompetent insofar as he could not  
8 understand the nature and consequences of the proceeding or to  
9 assist in his defense within the constraints of 4241(d). I  
10 conclude, as I have said, that Bejaoui is not thus disabled.

11 The hearing focused on the apparent disconnect between  
12 the symptoms of psychosis, paranoia, and dementia at times  
13 demonstrated by the defendant in the presence of his physicians  
14 and his attorneys on the one hand and, on the other hand, what  
15 both sides concede is a markedly improved mental capacity when  
16 he speaks with his wife or friend by telephone on the other  
17 hand.

18 Dr. First agreed that Bejaoui had displayed "striking  
19 discordance" in cognitive function depending on the setting.  
20 Hearing transcript of August 13th at 49. The government  
21 expert, Cochrane, phrased it that Bejaoui had intentionally  
22 misled his examiners by "malingering symptomatology of  
23 schizophrenia." August 13 transcript at 155.

24 Both experts appear to agree that the defendant  
25 misrepresented the extent of his symptoms, but they do disagree

1 over whether Bejaoui's conduct lies within his control or is  
2 beyond it. The government expert felt, obviously, it was  
3 within his control and he was malingering, and the defense  
4 expert thought that it was not within his control and was part  
5 of a major depressive disorder with psychotic features.

6 Based on those experts' opinions and on the recordings  
7 of the phonecalls and the other evidence, as I said, I conclude  
8 that he is not incompetent to stand trial, that is, he is  
9 competent to stand trial.

10 Dr. First's analysis was well articulated, it was  
11 thoughtful. The bona fides of any of these experts is not at  
12 all at issue. But the First analysis, in the view of the  
13 Court, does not satisfactorily account for the demonstrated  
14 behavior of the defendant on all occasions, and in fact First  
15 conceded that that was true. August 14 transcript 139 to 140.

16 The preponderance of the evidence does not support  
17 First's view that Bejaoui is unable to understand these  
18 proceedings or to assist his attorney. The preponderance of  
19 the evidence does indicate that Bejaoui does understand the  
20 proceedings but is unwilling to assist his attorneys, in part  
21 an expression of what both sides view as a histrionic difficult  
22 personality. That is described by both of the expert  
23 witnesses.

24 As I have said, both parties agree that the defendant  
25 displays manifestly inconsistent behavior depending upon the

1 setting. These inconsistencies include the physical. The  
2 staff at Butner observed that "he was able to ambulate and did  
3 not need a wheelchair," Government Exhibit 1 at 8, "but he  
4 nevertheless insists on using one."

5 Bejaoui appeared almost catatonic -- that is my term  
6 as a layman, I don't purport to use that term as an expert --  
7 in the courtroom during the competency hearing. He simply  
8 stared ahead. He wasn't immobile, but he would stare either  
9 straight ahead or down. To my knowledge, he was not saying  
10 anything during that hearing and he did not appear to be  
11 focusing on what the testimony was. Nonetheless, it is  
12 uncontradicted in the record that at Butner he was "very  
13 animated most of the time." August 13 transcript at 164.

14 Those are physical inconsistencies.

15 The inconsistencies also include the mental. The  
16 defendant reports that he does not remember his birth date and  
17 incorrectly estimates his own age. That's in the tests that  
18 were done by the expert. But neither expert states that these  
19 symptoms have a medical explanation. August 13 transcript at  
20 79-80, 160-163, and 180-181. Bejaoui erred widely when Dr.  
21 First asked him what the current date was, but he made no such  
22 error when he was speaking to his wife on the telephone.  
23 August 13 transcript at 89.

24 Bejaoui expressed strikingly disorganized thoughts to  
25 his examiners, but when he wanted something from the medical



1 personnel, such as access to a notary, he became intelligible  
2 to such a degree that he dealt directly with a notary, told him  
3 where to sign the document at, and even pointed out to her that  
4 the power of attorney granted the power solely over his  
5 financial affairs. Hearing transcript of August 13th at 178.  
6 For whatever it's worth, the notary, who did not testify, did  
7 not notice anything that was "wrong" with him and thought he  
8 was "fairly organized." August 13 transcript at 179.

9           The list of differences in what he was doing that I  
10 just gave is not exhaustive. The hearing showed other  
11 inconsistent and medically inexplicable behavior, such as  
12 reporting debilitating back pain but at the same time refusing  
13 diagnostic imaging that might aid in his relief. Government  
14 Exhibit A at 16.

15           Similarly, he had an "exaggerated" hand tremor in the  
16 view of the medical observer when he was talking with the  
17 Butner staff, but he had no tremor when he did not deal with  
18 the staff. Government Exhibit A at 17. Similarly, he  
19 professed fears that the staff at Butner would poison him, but  
20 he accepted food, drink, and medicines from the staff. August  
21 13 hearing at 181.

22           Thus, the Court concludes that the defendant has a  
23 much greater capacity in private than he demonstrates in  
24 public. Even Dr. First acknowledged that "when it is someone  
25 Bejaoui trusts, like his wife or his friend Riatt, he clearly

1 is able to show that he knows what is going on," August 13 at  
2 89 to 90, and that Bejaoui "is not being honest in how he  
3 performs when you do diagnostic testing." August 14 transcript  
4 at 146.

5 His phonecalls from Butner which were recorded reveal  
6 that he is able to digest complex issues. For example, he  
7 discussed immigration paperwork with his friend and even  
8 referred to particular government forms by their form number.  
9 August 14 transcript at 22 to 23 and Government Exhibit 31. He  
10 and his friend discussed then-current events in Libya, Tunisia,  
11 and Syria. That is the same transcript reference. His ability  
12 to navigate these topics in a relaxed setting reflects the  
13 capacity for higher-order thinking that can just as readily be  
14 utilized to assist his attorneys in his defense.

15 Dr. First does contend that "there is a real cognitive  
16 impairment" lurking beneath his symptoms, that is, Bejaoui's  
17 symptoms, which the doctor concedes are exaggerated. August 14  
18 transcript at 149. Dr. First centers his conclusion on, among  
19 other things, Bejaoui's "pauses" and "memory problems" that  
20 occurred even during conversations with his wife.

21 The Court accepts that Bejaoui exhibits some degree of  
22 paranoia -- again, that is a layman's use of the term -- as  
23 well as confusion. The symptoms, however, did not permit me to  
24 conclude that Bejaoui is "unable to understand the nature and  
25 consequences of the proceedings against him." This is

1 especially true in light of high functioning behavior the  
2 defendant demonstrates on his telephone calls.

3           The Court agrees with Dr. Cochrane that the phonecalls  
4 reveal that Bejaoui "can be organized, coherent, and can  
5 communicate information." August 14th at 23. I credit the  
6 Cochrane conclusion that the defendant "suffers from  
7 distress" -- again, nobody seems to dispute that -- but that  
8 "he does not suffer from significant mental illness, symptoms  
9 of which would interfere with his competency." August 14 at  
10 18.

11           I do not mean to state that I accept Dr. Cochrane's  
12 opinions without reservation. I do not. For example, the  
13 record note made by one of Dr. Cochrane's colleagues shortly  
14 after the defendant's arrival at FMC Butner states that  
15 Cochrane had already "concluded Bejaoui was an unreliable  
16 historian, was somatizing and/or malingering other clinical  
17 presentations and was feigning psychosis." August 14  
18 transcript at 80. Dr. Cochrane's rapidly developed conclusion  
19 certainly suggests that he had a preconceived view regarding  
20 Bejaoui's condition.

21           But Cochrane explained on the stand that he had not at  
22 that time reached a "firm conclusion" about Bejaoui's  
23 condition, that the notes reflected his preliminary hypothesis.  
24 August 14 transcript at 80. I accept that explanation. And  
25 the evidence at the hearing revealed that in fact Cochrane and

1 others conducted further evaluation of Bejaoui, that he did not  
2 base his conclusion solely on his earliest impressions.

3 He also incorporated the views of professional staff  
4 members that were assisting. In fact, the final report that  
5 concludes that Mr. Bejaoui was competent and was malingering  
6 was co-signed by Dr. Herbal, not only by Dr. Cochrane.

7 So I do conclude that he is able to understand the  
8 nature and consequences of the proceedings against him. I also  
9 believe that he is able to assist in his defense.

10 The experts disagreed about whether Bejaoui had the  
11 capacity to assist in his own defense. First opined that Dr.  
12 Bejaoui's "ability to work with his attorneys in any reasonable  
13 way is compromised due to his paranoia, his depression, and his  
14 personality." August 14th at 141. That is, his mental state  
15 prevents him from communicating with his lawyers as clearly and  
16 as cogently as he obviously communicates with his wife. I  
17 should also mention that the telephone calls reflect a very  
18 loving relationship between Mr. Bejaoui and his wife, which is  
19 all to the good.

20 By contrast, Dr. Cochrane hypothesizes that Bejaoui's  
21 difficult relationship with his attorneys, which this Court has  
22 observed first-hand, especially early on in the litigation, in  
23 regard to his prior attorneys and the difficulties he was  
24 having with them, some of those difficulties set forth in  
25 apparent disagreements in open court with his attorney,

1 reflects his "histrionic personality" which "could make  
2 interactions difficult with counsel, but it is thought to be to  
3 a large extent volitional and within one's control." That's  
4 Cochrane explaining the histrionic personality, and that is on  
5 August 13th at 167.

6 As I said before, both experts conclude that the  
7 defendant is a difficult personality. They disagree over the  
8 voluntariness of his behavior.

9 I cannot conclude that the defendant is unable to  
10 assist in his defense.

11 Again I turn to the telephone calls, especially the  
12 one where he coordinated with his wife about granting her power  
13 of attorney, government Exhibit 8, which is the transcript,  
14 page 3/lines 10 to 27, and the fact that he subsequently  
15 educated his wife on the effect of the power of attorney. I  
16 have already referred to that. Transcript and Government  
17 Exhibit 14 at page 2/lines 14 to 16.

18 On yet another occasion he instructed his wife to  
19 contact his lawyer, whom he identifies by name, to inform that  
20 lawyer that he had been mistreated. The transcript that is  
21 Government Exhibit 22 at page 4/line 33, and page 5/line 2 and  
22 page 7/lines 17 to 14. Yet later he asked his wife to tell one  
23 of his attorneys to take the statement of an intern whom  
24 Bejaoui believe witnessed the psychologist threatening him.  
25 Government Exhibit 23 at page 528 to 31.

1 Again, this reflects the certain degree of paranoia  
2 the man has, but it also shows his higher order of being able  
3 to communicate and deal with legal matters and to communicate  
4 what he is thinking and what he wants.

5 On one of the calls his wife asked whether he had ever  
6 received a dismissal notice for his prior state case. When he  
7 said no, he told her to go to Brooklyn court to get it. That's  
8 Exhibit 14 at page 4. This line of conduct over a series of  
9 phonecalls reveals that the defendant has a significant ability  
10 to strategize in protecting and advancing his own interests  
11 even in a legal context and, when motivated, can effectively  
12 communicate his thinking and directions to others.

13 The Court accepts what his attorneys state, namely,  
14 that the defendant has not been assisting them in their efforts  
15 to defend him. They are quite insistent on that, and I have no  
16 reason to deny it. I further acknowledge that Bejaoui says  
17 things to them from time to time that can be characterized as  
18 fanciful. See Dr. First's report at page 12 recounting  
19 Bejaoui's express fear that his attorney is attempting to trick  
20 him into signing a confession. Nonetheless, I am unable to  
21 conclude that the defendant is unable to assist his attorneys  
22 due to depression-induced paranoia, which is the First  
23 conclusion.

24 I certainly hope it is clear that when I have been  
25 referring to the First conclusions, I am talking about Dr.

1 First throughout this. That is the transcript of August 14th  
2 at 146 to 47.

3 In that regard, I'm persuaded by the defendant's own  
4 words to his wife in a telephone call from Butner, and this is  
5 the transcript.

6 "Maria: You know, so now when the lawyer came to see  
7 you, what did he say?" That is what his wife is saying

8 The defendant responds: "Nothing, absolutely nothing,  
9 sweetheart. I swear to God, he didn't tell me nothing. All he  
10 was concerned about: Do I understand, do I understand. I  
11 don't have to understand anything. Are you doing the job for  
12 me or not? Then I said, you know, it's not worth it to speak  
13 to you, and then I left.

14 "It's not worth it, because all they have to do,  
15 Maria, is trying to get me to a hospital in Brooklyn or  
16 Manhattan so I can be close to my family. The further you  
17 getting me, the more you getting me not willing to work with  
18 him or even talk to him. That's why I prefer you talk to him."  
19 That is the transcript at Government Exhibit 7 page 5/lines 5  
20 to 23.

21 From that conversation the Court concludes that the  
22 defendant himself considers his noncooperative behavior to be a  
23 method of influencing his attorneys. That accords directly  
24 with Cochrane's theory of Bejaoui's obstinacy, more than Dr.  
25 First's theory of depression with psychotic features.

1           Accordingly, I cannot conclude by a preponderance of  
2     the evidence that the defendant is unable to assist properly in  
3     his defense. I credit Dr. Cochrane's conclusion that Bejaoui  
4     is able to assist in his defense but refuses to do so, and I so  
5     find by a preponderance of the evidence.

6           In sum, I find by a preponderance of the evidence that  
7     the defendant is able to understand the proceedings against him  
8     and is able to assist his attorneys pursuant to 4241(d). The  
9     proceedings in this action shall move forward.

10          I don't know if the parties now want to discuss how to  
11     go forward. There are no other motions in the case as set  
12     forth by Mr. Dratel in a letter dated January 18, 2011. There  
13     is part of a pending motion that still exists, and it is to  
14     suppress a certain statement to the FBI, I think on the basis  
15     that no Miranda warnings were given.

16          Mr. Dratel, do you want to think about whether you  
17     still want to press that? I think it may have been made by a  
18     prior attorney. If you do want to press it, I'll set a date  
19     for a fact hearing and we'll set a trial date. Parties, talk  
20     to me.

21          MR. DRATEL: Certainly, your Honor. It makes sense to  
22     set a date so I can review and then determine whether we are  
23     going to proceed with that motion, and then to set a trial date  
24     as soon as we can, essentially, with proper preparation. It's  
25     been a long time since we looked at the merits of the case.



1 THE COURT: Of course. You tell me, sir. You're the  
2 defense. What would you like? I will accommodate you to the  
3 extent possible. You know I have said throughout that the  
4 concern of the Court is the amount of time this defendant has  
5 spent both in state custody, after which the charges were  
6 dropped I think on speedy trial grounds, plus this period of  
7 time which was necessitated because of the competency issues.  
8 I'd like to move this forward now that that issue has been  
9 decided. It's whatever you want, essentially.

10 MR. DRATEL: Your Honor, I'm curious. If I could be  
11 reminded by the government in terms of how long the government  
12 anticipates its case to be?

13 THE COURT: Talk to me, please, because I can't hear  
14 you when you turn around.

15 MS. KOVNER: I'm sorry. I think we can present our  
16 case within a week, your Honor.

17 THE COURT: Do you want to do it at the beginning of  
18 the year?

19 MR. DRATEL: That's a little late because of something  
20 that I have coming up. I have a trial in January. I have  
21 something out of town on the 11th, a sentencing that I must do,  
22 that has been delayed already, and the Court has stated she  
23 does not wish to adjourn it any further. If we could start  
24 maybe December 12th, if we could get another week, that would  
25 be good.

1 THE COURT: For the trial?

2 MR. DRATEL: Yes.

3 MR. WILSON: Your Honor, the government will proceed  
4 whenever is convenient for the Court. I will note that I have  
5 another trial starting December 10th, which we expect to go  
6 that day. Obviously, we are somewhat fungible, and I believe  
7 Ms. Kovner is available. So your Honor is aware.

8 THE COURT: Thank you. I have always viewed the  
9 Assistant U.S. Attorneys as totally fungible. I don't know if  
10 that is good news for you or not, but that is the Court's view.

11 All right. December 12. Let's keep it a little  
12 flexible because I want to talk with the jury people. I know  
13 it is a little difficult to get people in around Christmas.  
14 But we may be talking about December 11 instead of December 12  
15 because the panels come in on Monday.

16 MR. DRATEL: The sentencing I have is the 11th,  
17 unfortunately, in Chicago. I would be back the afternoon of  
18 the 11th.

19 THE COURT: Let's keep it within a day or two.

20 MR. DRATEL: We can pick it on Monday and I can come  
21 back on Wednesday.

22 THE COURT: That's exactly what I was thinking. But  
23 let's keep it flexible. Right now we will say December 12th.  
24 As we get closer, if I think it will be easier to get a jury on  
25 the 10th, I'll notify the parties. All right?

1 MR. DRATEL: Yes.

2 THE COURT: December 12 trial, 9:30 a.m. Can the  
3 parties live with any motions in limine on November 12th? It's  
4 farther in advance than I normally would do, but I think it is  
5 appropriate. November 12th any motions in limine, proposed  
6 jury charges and, if the parties wish, proposed voir dire. I  
7 think all of you know that I essentially do my own voir dire,  
8 but I'll look at anything you want to send me. If I think it  
9 is appropriate, I'll add it to my own voir dire. If you wish,  
10 voir dire. But I do want proposed jury charges and I want any  
11 motions in limine by November 12.

12 I would like responses to the motions in limine, if  
13 any, on November 19th. Trial December 12, 9:30 a.m. And I'll  
14 set aside that week and the other week, the 12th through the  
15 21st, if need be.

16 MR. DRATEL: For a hearing date, if necessary, for the  
17 motion, that week of the 19th is good for me, those three days  
18 before Thanksgiving, if you wanted to set aside a morning or an  
19 afternoon.

20 THE COURT: I'd rather do that earlier, if you can.  
21 That can be done in October also.

22 MR. DRATEL: I have something that I am trying to  
23 schedule for the 29th through the 31st where I have to go to  
24 the government to interview a witness. The 2nd of November  
25 would be fine. That's a Friday, if that's OK. The problem is

1 also have a Rule 15 trip out of the country from about November  
2 5 through the following week, so it's logistically difficult.

3 THE COURT: Let's do it on October 30 -- you're going  
4 to be working with the government on that other trip -- if it  
5 doesn't, and I take it it may not, happen.

6 MR. DRATEL: It may not happen on those days, but it  
7 will happen.

8 THE COURT: Let's set this for October 30.

9 MR. DRATEL: This may not happen at all anyway.

10 THE COURT: Can I assume half a day or less,  
11 government?

12 MS. KOVNER: Yes, your Honor.

13 THE COURT: Let's set it for 2 p.m. Far enough in  
14 advance so that the government can coordinate with its  
15 witnesses, let them know and let the Court know whether you  
16 need a change of that date.

17 MR. DRATEL: Certainly, your Honor.

18 THE COURT: October 30th, half a day, 2 p.m.  
19 Anything else?

20 MS. KOVNER: Your Honor, we would ask that time be  
21 excluded from now until the trial date to allow preparation of  
22 the motion and preparation for trial.

23 MR. DRATEL: No objection, your Honor, because we have  
24 the motion possibly pending.

25 THE COURT: Let me put the exclusion on the record,

1 sir. On motion of the government, with the defense stating it  
2 has no objection, I hereby exclude time from today until  
3 December 12th from calculation pursuant to the Speedy Trial  
4 Act. The exclusion is made pursuant to 18 U.S.C. section  
5 3161(h)(7)(A).

6 I do make the finding that the ends of justice  
7 outweigh the interests of the public and Mr. Bejaoui in a  
8 speedy trial. The purpose is to allow the parties to prepare  
9 for a suppression hearing and for the defense to determine  
10 whether it wishes to press that issue. I take it, sir, you  
11 will let me know when you decide, if you decide not to.

12 MR. DRATEL: Probably within a week or ten days.

13 THE COURT: Good. And also to prepare for trial. The  
14 exclusion is from today until December 12th. That is an  
15 interests of justice exclusion. There also is an automatic  
16 exclusion because there is a pending motion in existence.

17 MS. KOVNER: Your Honor, if I recall correctly, in  
18 connection with the suppression motion there was a controversy  
19 about whether Mr. Bejaoui had in fact adopted the motion,  
20 wanted the motion to go forward. The hearing was triggered by  
21 his filing an affidavit, which I think he then disputed whether  
22 he had in fact intended to sign. I would ask that Mr. Dratel  
23 clarify in his letter to the Court whether Mr. Bejaoui was in  
24 fact adopting that motion.

25 THE COURT: Adopting the affidavit. I take it your

1 position is there is no fact underpinning sufficient to bring  
2 on a fact hearing?

3 MS. KOVNER: That's right, your Honor.

4 THE COURT: I forgot that, but now I do remember  
5 something about that. Mr. Dratel will be in communication with  
6 you and the Court.

7 MR. DRATEL: Yes. Thank you, your Honor. Also, just  
8 as a matter of preservation, I am formally objecting to the  
9 Court's decision, since we are doing it in open court, in other  
10 words, the Court's decision on the competency motion.

11 THE COURT: You are preserving your right to appeal.

12 MR. DRATEL: Right.

13 THE COURT: Of course. That is one of the reasons I  
14 thought it best to set my thinking out in writing and to read  
15 it so that it's clear, as clear as I can make it. You have  
16 four corners, so you will be able to effectuate your appeal  
17 rights should you believe it to be necessary.

18 MR. DRATEL: Thank you.

19 THE COURT: Anything else? Defense?

20 MR. DRATEL: No, your Honor.

21 THE COURT: Government?

22 MS. KOVNER: No, your Honor.

23 THE COURT: Thank you all.

24 (Adjourned)  
25